Supreme Court, U.S.
FILED

001262 FEB 2 - 2001

No. ——

IN THE
Supreme Court of the United States

SHOSHONE-BANNOCK TRIBES,
Petitioners,

v.

UNITED STATES OF AMERICA
and FMC CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 2, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Should the U.S. Environmental Protection Agency be required to exercise its federal fiduciary obligations to Indian tribes under the Resource Conservation and Recovery Act to fully protect and preserve reservation lands from hazardous waste pollution and contamination?

2. Should the U.S. Environmental Protection Agency's decisions be subject to a heightened scrutiny of judicial review where the federal actions directly impact trust property and tribal interests?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were the petitioner Shoshone-Bannock Tribes, and the respondents United States of America and the FMC Corporation.

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Petition For A Writ Of Certiorari

The Petitioner Shoshone-Bannock Tribes respectfully prays for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on July 7, 2000.

Opinions Below

The opinion of the Court of Appeals for the Ninth Circuit is an unreported opinion of the Ninth Circuit, and is reprinted in the appendix hereto, App. 2a-6a. The order on the petition for *en banc* rehearing of the Court of Appeals is also included in the appendix, App. 1a.

The Order of the United States District Court for Idaho has not been reported. It is reprinted in the appendix hereto, App. 7a-10a.

Jurisdiction

Invoking federal jurisdiction under 28 U.S.C. §§ 1331, 1361, 1362, and 42 U.S.C. §§ 6928(a), 6991e, the United States Environmental Protection Agency (EPA) brought this enforcement action against the FMC Corporation in the District of Idaho. Petitioner intervened into the action opposing the consent decree. On July 13, 1999, the District Court entered the lodged consent decree.

Petitioner appealed the entry of the consent decree. The Ninth Circuit entered its decision on July 7, 2000. A timely petition for *en banc* rehearing was denied by an order of the Ninth Circuit entered on October 5, 2000.

On December 19, 2000, Justice O'Connor, Circuit Justice for the Ninth Circuit, ordered that the time for filing of the instant petition be extended to and including February 2, 2001.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

Statutory And Regulatory Provisions Involved In The Case

This case involves portions of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA) and the Hazardous and Solid Waste Amendments, 42 U.S.C. §§ 6901 *et seq.*, regarding hazardous waste treatment, storage and disposal.

Statement Of The Case

In 1867, the Fort Hall Reservation (Reservation) was designated by Executive Order for the Petitioner who occupied the area for time immemorial. On July 3, 1868, the Petitioner concluded the Second Treaty of Fort Bridger, which was ratified by the United States Senate on February 24, 1869. 15 Stat. 673. Article 4 of the Fort Bridger Treaty reserved the Reservation as a "permanent home" for the Petitioner. The present day Reservation is approximately a half million acres. *FMC v. Shoshone-Bannock Tribes,* 905 F.2d 1311, 1312 (9th Cir.), *cert. denied*, 499 U.S. 943 (1991). The overwhelming majority of the Reservation (96%) is Tribal land or held by the United States for the benefit of the Tribes or its individual members. *Id.* The remaining is held in fee status. The current Reservation population is about 6,000 with the resident Tribal membership about 3,600.[1]

The Petitioner's Reservation is home to the largest elemental phosphorous plant in the world, the FMC Corporation. FMC owns approximately 1100 acres on the Reservation. *FMC v. Shoshone-Bannock Tribes, supra,* 905

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[1] The Petitioners are a federally recognized Indian tribe organized under Sections 16 and 17 of the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.*, and reside in southeastern Idaho. In 1936, the Petitioner's general membership voted to adopt a Constitution and Bylaws which is one of the organic documents of the Tribes. The Tribes also have a federally chartered corporation which manages several businesses of the Tribes throughout the Reservation.

F.2d at 1312. For 50 years, FMC has generated, stored, buried, and stockpiled hazardous waste at its plant. Numerous solid waste, air emissions and wastewater streams are generated during the processing of the ore. FMC has placed reactive and ignitable waste in the ponds and surface impounds without deactivating the waste. These wastes are considered ignitable hazardous wastes pursuant to RCRA regulations. Certain ponds also store elevated airborne levels of phosphine, a highly toxic gas.

The Petitioner, river systems, streams and groundwater systems of the Reservation reside predominantly downstream and downwind from the FMC plant that emits pollutants in such large amounts that it is one of the largest polluters in the United States.[2] Last year, the Agency for Toxic Substances and Disease Control found that air emissions from the area pose a "public health hazard." Additionally, FMC's facility has contaminated the Reservation's water and land, and has caused it to be part of the Eastern Michaud Flats Superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 *et seq.*

In 1998, this action was commenced by the EPA against FMC for certain violations of the RCRA and regulations promulgated regarding hazardous waste treatment, storage and disposal at the FMC facility located on the Petitioner's treaty guaranteed homeland. As a result of the complaint, the EPA and FMC negotiated a consent decree to resolve the RCRA violations.

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[2] The Reservation is designated as a non-attainment area for air pollution based on the National Ambient Air Quality Standards (NAAQS) for particulate matter (PM-10) air pollution emitted from the FMC plant throughout the Reservation. FMC is the only major stationary source of PM-10 in the Fort Hall non-attainment area. EPA has never issued a federally enforceable air quality operation permit or no emission limits have been mandated by the EPA.

The Petitioner, however, was not an official party to the negotiations, the Tribal governing decisionmaking body was never consulted by EPA, and the Petitioner was not a signatory to the consent decree. A few of the Tribal staff attended some EPA meetings but no person with delegated decisionmaking authority. The Petitioner filed public comments and intervened into the federal action to oppose entry of the consent decree. The Petitioner argued that the consent decree contains provisions and agreements that are contrary to preservation of the federally guaranteed lands for the Petitioner and in disregard of the best interests of the Petitioner.

The gist of Petitioner's opposition was that EPA did not meet its trust obligations to the Tribes because it treated the Tribes as the general public and the treaty guaranteed homelands as common real estate which departed from its trust duties owed to Indian tribes when federal decisions directly impact treaty reserved lands. The EPA never specifically considered the environmental and health impacts of the consent decree (proposed federal action) on the Tribes as a separate concern and entity. The District Court granted the entry of the consent decree. App. 10a. The District Court rejected the Petitioner's claims and held that EPA had met its trust responsibility to the Tribes. The EPA adopted EPA's position that the local off-Reservation economics and public interests outweighed the trust obligations. App. 9a.

In due course, the Petitioner took an appeal to the Ninth Circuit from the final order of the District Court. The Petitioner invoked the Ninth Circuit's jurisdiction under 28 U.S.C. § 1291 to review "final decisions" of district courts.

The Petitioner claimed on appeal that the District Court erred in balancing the Tribal interests against economic interests and the general public. The Petitioner pointed out to the panel that the EPA made basic assumptions about the Tribes and Reservation environment based on general reports

for the general public, but undertook no independent investigation, review, or study of health conditions of the impacted population—the Tribes. EPA never took into account in its decisionmaking process the impacts on the Tribes as a separate entity from the surrounding community. EPA at no time attempted to glean from the Petitioner health care, diet, socioeconomic status, ecological and health risks or determine cumulative impacts on the Tribal people who have lived on Reservation all their lives and have been exposed to the hazardous waste air emissions, the dust from the slag piles, and toxic phosphine and hydrogen cyanide emissions from the waste ponds. In short, the Petitioner maintained that the trust doctrine required EPA to meet its procedural and substantive duties of protection to the Tribes, to take a hard look, and assess the impacts on the Tribal population and Reservation.

On review, the Ninth Circuit upheld the District Court decision. The panel reviewed the District Court's order based on an abuse of discretion. App. 4a. The Ninth Circuit also gave deference to the EPA and parties who negotiated the consent decree. App. 4a.

The Ninth Circuit found that the EPA "does owe a general trust responsibility to Indian tribes" but "RCRA is not aimed specifically at protecting Indian tribes." App. 4a. Thus, EPA "does not have a specific trust duty to enforce RCRA on fee lands within the Tribes' reservation." App. 4-5a. Based on this reasoning, the panel summarily concluded, "the records discloses a diligent assertion of RCRA claims by the government, a fair and extensive consultation with the Tribes, and reasonable settlement reached at arm's length between the government and FMC. The United States therefore satisfied its general trust duty to the Tribes." App. 5a.

The Petitioner timely filed a Petition for Rehearing *En Banc*. On October 5, 2000, the Ninth Circuit denied the petition for rehearing. App. 1a.

Reasons For Granting The Writ

I.

Certiorari Should Be Granted To Determine Whether EPA Has Specific Fiduciary Duties To Indian Tribes Under RCRA To Protect And Preserve Reservation Lands From Hazardous Waste Pollution And Contamination

The Ninth Circuit has fashioned for the EPA an extraordinary exception to its established fiduciary duties to Indian tribes. By upholding EPA's decision to limit its trust obligations to the Petitioner under RCRA, the Ninth Circuit permits EPA to discharge its solemn trust obligations to tribes by meeting the "general regulations and statutes not specifically aimed at protecting Indian tribes." App. 5a. This ruling for the first time raises a significant issue of the agency's trust responsibility to Indian tribes under RCRA when EPA is regulating hazardous waste generating facilities and the continued operation of such facilities located on an Indian reservation.

As it happens, EPA, on Indian reservations, is the primary permitting, monitoring, compliance and enforcement agency. Importantly, RCRA is the only major federal environmental statute that fails to expressly delegate authority to Indian tribes.[3] The Petitioner is unaware of any Indian tribe in the country that has a RCRA hazardous waste program. In this instance, where Congress has not yet expressly acknowledged Indian tribes' regulatory authority under RCRA, the federal trustee's obligations to preserve and protect Indian lands, and tribal interests is even more critical. *See Washington Dept. of*

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[3] The Clean Air Act was amended in 1977 to authorize EPA to treat tribes as states for the Act's program. 42 U.S.C. § 7474 (1994); the Safe Drinking Water Act was amended in 1986, 42 U.S.C. § 300j-11 (1994); the Comprehensive Environmental Response, Compensation, and Liability Act was amended in 1986, 42 U.S.C. §§ 9601 *et seq.*; and the Clean Water Act was amended in 1988, 33 U.S.C. §§ 1251-1387 (1994).

Ecology v. EPA, 752 F.2d 1465, 1470 (9th Cir. 1985) ("the United States in its role as primary guarantor of Indian interests legitimately may decide that such tribal concerns can best be addressed by maintaining federal control over Indian lands").

Enacted in 1976, RCRA is perhaps the most pervasive federal environmental statute that overlaps the Clean Water Act, *supra*, the Clean Air Act, *supra*, and the Comprehensive Environmental Response, Compensation, and Liability Act, *supra*. The EPA is charged with the responsibility of integrating RCRA with the other laws for the purpose of administration, permitting, and enforcement on Indian lands. However, according to the Ninth Circuit, the EPA only has to comply with general regulations and law despite the contamination occurring on Indian treaty reserved lands. This limitation of trust duties owed to tribes, particularly when EPA is the exclusive agency with authority to act, falls far short of meeting the "most exacting fiduciary standards" enunciated by this Court. *See, Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

Over 170 years ago, Chief Justice Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), first articulated the federal-tribal trust doctrine and recognized that the United States has a solemn trust obligation to Indian people (Indian tribes were "domestic dependent nations" whose relationship to the United States resembled "that of a ward to his guardian"). Justice Marshall's guardianship theory was grounded in a general duty of the United States, as the more powerful sovereign, to protect tribal lands and the right of self-government within tribal territories. The source of the federal government's trust responsibility is established by the provisions of treaties, agreements, statutes, and "reinforced by the undisputed existence of a general trust

relationship between the United States and Indian people." *United States v. Mitchell*, 463 U.S. 206, 226 (1983).[4]

This trust responsibility requires the federal trustee to protect Indians and their property. *See e.g., United States v. Kagama*, 118 U.S. 375, 383-84 (1886); *United States v. Creek Nation*, 295 U.S. 103, 110 (1935). Nearly four hundred treaties between Indian tribes and the United States and an entire title of the United States Code are premised on this trust relationship. *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

All three branches of the federal government have recognized and enforced this trust responsibility. In *Seminole Nation, supra*, 316 U.S. at 296-297, this Court declared the federal trustee's obligations are even greater than those of any ordinary trustee. The Court described this relationship:

> In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under humane and self imposed policy which has found expression in many acts of Congress (footnote omitted) and numerous decisions of this Court, *it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.*

(emphasis added); *accord, United States v. Mason*, 412 U.S. 391, 398 (1973).

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[4] Over a century ago, this Court held in *Ward v. Racehorse*, 163 U.S. 504, 509 (1896), that the goals of the United States in reserving the Fort Hall Indian Reservation were "to protect . . . [the Tribes'] rights and to preserve for . . . [them] a home where . . . [their] tribal relations might be enjoyed under shelter of the authority of the United States." This trust relationship described in *Ward v. Racehorse*, was established in the Fort Bridger Treaty of 1868 wherein the Tribes agreed under Article 4 "they will make said reservation their permanent home . . . ."

The standards of fiduciary conduct imposed by the trust doctrine apply to any federal government actions including all executive agencies dealing with protected Indian interests and the administration of federal programs. *See Seminole Nation, supra; Morton v. Ruiz,* 415 U.S. 199, 236 (1974). Significantly, EPA has for many years expressly recognized a fiduciary duty toward Indian tribes. The 1984 EPA Statement on Indian policy declares, "[i]n keeping with that [trust] responsibility, the Agency will endeavor to protect the environmental interests of Indian tribes when carrying out its responsibilities that may affect the reservations. *EPA Policy for the Administration of Environmental Programs on Indian Reservations* 3 (Nov. 8, 1984). Thus, EPA's Indian Policy establishes a substantive obligation on the part of EPA to fully protect Indian property rights—trust resources.

The Ninth Circuit's decision is contrary to the trust principles announced by this Court in *United States v. Mitchell,* 463 U.S. 206 (1983).[5] In *Mitchell,* the Court determined that even apart from statutory expression of a trust, a fiduciary relationship arises whenever the executive branch maintains extensive control over Indian property. Thus, the Court's opinion creates a trust obligation arising out of circumstances rather than expressed intent. 463 U.S. at 226. In the RCRA situation on Indian reservations, the EPA has control over virtually every stage of the RCRA process—monitoring, permitting, inspections, enforcement and compliance. All of these actions directly affect and have a pervasive impact on Indian resources that, in effect, the EPA should be deemed to have control. RCRA should be, as the

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[5] In *Mitchell I and II,* the Quinault Tribe and Indian plaintiffs filed an action in the Court of Claims for seeking money damages against the United States for alleged mismanagement of forest resources on allotted lands within the Reservation. This Court affirmed the Court of Claims decision finding a breach of the United States duties on two independent trust paradigms.

Mitchell II Court pointed out, be construed in light of the federal government's fiduciary duty to Indian nations. 463 U.S. at 225. Given the presumption under the Indian trust doctrine jurisprudence that EPA is obligated to protect the best interests of tribal people and tribal lands, the court's conclusion that EPA has no special duties to tribes in the RCRA setting where hazardous waste has contaminated Indian lands—is a striking result and raises serious problems.

The distinction between (i) lands reserved by treaties, Executive Orders, or specific acts of Congress, and (ii) lands located off reservation and considered common real estate is critically important to the case at hand. Treaty reserved lands, in this instant matter, were set aside for the Tribe's benefit and federal protection pursuant to action by Congress. *See, Ward v. Racehorse, supra.* Indeed, the dominant tenet which emerges from the early treaty and trust cases is that the Indians best interests lie in preserving the tribe's sovereign nation status, resisting assimilation forces, and preserving their homelands. *See Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832). Today, most fundamentally, the modern form of the trust obligation is the federal government's duty to protect this separatism by protecting tribal lands, resources, and the Indian way of life, and shielding Indian lands from environmental threats. *See United States v. Creek Nation, supra,* 295 U.S. at 110. This federal policy of preserving tribal lands and tribal separatism is also represented in Congressional principles of tribal self-determination. *See Indian Self Determination Act,* 25 U.S.C. §§ 450 *et seq.*

The federal policy of preserving treaty reserved lands mandates a federal trustee to exercise its duties in a manner that fulfills this purpose. The Ninth Circuit's application of RCRA's "general regulations and statutes not aimed at protecting Indian tribes" to treaty reserved lands cannot be reconciled with the clear federal principles supporting the preservation of reservation lands for tribal people. The

judicially created trust principles must be applied to supplement the RCRA provisions for federal Indian lands. Otherwise, the current result will imperil the use of reservation lands and the future generations of tribal people. Review by this Court of the Ninth Circuit's ruling is thus imperative.

This case also for the first time presents the question whether the EPA may selectively exercise its responsibility to Indian tribes when pollution or contamination is initially released on fee lands located within the boundaries of an Indian Reservation. The Ninth Circuit, based on no precedent, held "the United States does not have a specific trust duty to enforce RCRA on fee land within the Tribes' reservation." App. 5a.

The Ninth Circuit's creation of an exception for fee lands located within the boundaries of a Reservation has effectively severed the trust responsibility owed to tribes when the occurrence arises on fee lands. This radical result allows EPA the unilateral authority to constrain and limit its trust obligations owed to tribes if the contamination or pollution initially arises on fee lands. The conflict between established law, the EPA's own policies, and sound, rational environmental management could not be more complete.

The Ninth Circuit's interpretation of the limits of EPA's trust relationship and responsibilities to Indian tribes is indeed a new invention, and conflicts with the protection and preservation of Indian reservations by the United States. The United States entered into treaties fixing firm reservation boundaries in order to gain perpetual "peace" or "friendship" with Indian tribes. This Court has recognized that the tribes ceded their lands through treaties in the justifiable belief that the land they retained would be held by them in perpetuity for their undisturbed possession. *United States v. Payne, supra,* 264 U.S. at 448. Accordingly, the courts have recognized the reservation land base as a protected beneficiary interest for

purposes of the trust doctrine, and the executive branch's fiduciary duty to protect the tribal land base and the tribes. *See Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F.2d 370, 379 (1st Cir. 1975); *United States ex rel. Santa Ana Indian Pueblo v. University of New Mexico,* 731 F.2d 703, 706 (10th Cir.), *cert. denied,* 469 U.S. 853 (1984). Moreover, the duty to protect trust property has firm grounding in private trust law. *See Restatement (Second) of Trusts* § 176 (1959)("The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property").

Under the decision below, however, if there is a parcel of fee land located on a reservation that is polluting the reservation land base, the EPA does not have any specific fiduciary duties to enforce environmental laws to preserve the tribe's land base. Consequently, this affords EPA unbridled ability to take enforcement actions without any obligation under the trust doctrine to take appropriate steps to protect and preserve the beneficiary interest –tribal lands.

Importantly, this decision below is contrary to this Court's ruling in *Ward v. Racehorse, supra,* that the United States has a federal duty of protection of the Petitioner's lands. In *Ward v. Racehorse,* this Court declared that the goals of the United States in setting aside the Fort Hall Reservation were to "protect . . . [the Tribes'] rights and to preserve for . . . [them] a home where . . . [their] tribal relations might be enjoyed under shelter of the authority of the United States." The trust relationship and duty could not be clearer. The Ninth Circuit's unprecedented ruling, however, makes the Tribes' land vulnerable to adverse EPA action taken both on and off reservation boundaries which may significantly diminish the usable Indian land base. Under the Ninth Circuit's ruling, the RCRA does not require the EPA to provide a degree of protection sufficient to safeguard the tribal environment. This exception conflicts with the intent of establishing the

Reservation and insuring the separatism envisioned in the treaty process. Without Congressional authorization, the EPA under the Ninth Circuit ruling is permitted to limit its trust responsibility premised on land ownership lying within treaty reserved lands.

The Ninth Circuit ruling is also irreconcilable with EPA's own definition of "Indian lands" for purposes of hazardous waste regulation on Indian reservations. The EPA has asserted that absent independent state authority to regulate within reservation borders, EPA retains jurisdiction under RCRA to regulate on "Indian lands." 51 Fed. Reg. 3782, 3783. EPA defines "Indian lands" as being synonymous with the phrase "Indian Country" that is to "mean all lands (including fee lands) within Indian reservations, dependent Indian communities, and Indian allotments to which Indians hold title. *Id.* Under the EPA's Indian Policy, the EPA has assumed its trust responsibilities to Indian tribes. The ruling below is unfounded.

II.

The Ninth Circuit's Unprecedented Creation Of A Deferential Standard Of Review In A Challenge To An Agency's Action Based On The Federal Tribal Trust Doctrine Conflicts With Decisions Of This Court And The Well Established Principles Of The Trust Doctrine.

Without any precedent, the Ninth Circuit has created a new standard of judicial review in cases challenging the executive branches fulfillment of its trust obligations to Indian tribes for actions occurring and impacting treaty reserved and protected lands. By characterizing and reviewing this case solely as an environmental consent decree matter, rather than a challenge and review of the federal agencies' trust obligations owed to an Indian tribe, the Ninth Circuit subjected the agency's

action only to a judicial scrutiny commensurate with the Administrative Procedures Act, 5 U.S.C. §§ 701-76 (1990). App. 4a. According to the Ninth Circuit, the EPA's actions affecting Indian lands is entitled to a "deference" that presumes agency action to be valid. This standard of review has never been applied in federal Indian trust doctrine cases that affect tribal property and tribal interests. Such a drastic enlargement of the presumption owed to federal agencies in the Indian law context deserves this Court's attention.

The Ninth Circuit's creation and application of "deference" in Indian trust cases conflicts with this Court's ruling in *Morton v. Ruiz*, 415 U.S. 199, 232-38 (1974). In *Ruiz*, the Court held that the principles of administrative law do not solely control a court's inquiry into the agency's decision where tribal interests are implicated. *Id.* The Court imposed trust standards on top of the standards of review required by the Administrative Procedures Act. *Id.* at 236.

Ruiz, involved a dispute over the Secretary of the Interior's denial of general assistance benefits to certain Indians because, as allegedly required by the Snyder Act, they did not live 'on or near' an Indian reservation. *Id.* at 204-205. In addition to holding that the Secretary of Interior had failed to comply with the Administrative Procedure Act and with the Bureau of Indian Affairs' own regulations, the Court stated, "the denial of benefits to these respondents under such circumstances is inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Id.* at 235-37(quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)).[6]

The conflict between *Ruiz* and this instant case could not be more complete. The Court will not review alleged Indian trust violations based on administrative law principles which

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[6] For further discussion of the *Ruiz* case, *see Davis, Administrative Surprises in the Ruiz Case*, 75 Mich. L. Rev. 823 (1975).

give deference to agency's decisionmaking. According to *Ruiz*, the trust responsibility requires additional scrutiny with no deference.

Second, the Ninth Circuit's ruling that EPA's actions affecting Indian lands and tribes are given deference is tantamount to it concluding that EPA has unreviewable discretion. Moreover, this concept of "deferential" review is contrary to the well established federal Tribal trust doctrine principles, presented here, that involve matters of law requiring independent judicial interpretation. Indeed, the Ninth Circuit's new standard of judicial review of agency actions renders meaningless the established heightened scrutiny of federal actions impacting trust property and tribal interests required by the trust relationship.

This Court has developed the fiduciary standard of conduct owed to Indian tribes and has repeatedly recognized that the federal executive agencies are to be "bound by every moral and equitable consideration to discharge its trust with good faith and fairness." *United States v. Payne*, 264 U.S. 446, 448 (1924). Additionally, federal officials have "moral obligations of the highest responsibility and trust for Indian property and are subject to the most exacting fiduciary standards." *Seminole Nation, supra*, 316 U.S. at 296-97. Accordingly, an Indian tribes should not be required to prove to the trustee the particular measures which are necessary because "[a] tribe is 'entitled' to rely on the United States, its guardian, for needed protection of its interests." *Creek Nation, supra*, 295 U.S. at 110. Moreover, the courts owe their own fiduciary of protection towards tribes—a duty which, can be fulfilled only through rigorous judicial review of other federal actions affecting tribal interests.

The EPA acted as legal trustee of Indian lands during the consent decree negotiations, a role which included enhanced duties beyond the normal environmental regulatory duties performed by the agency. EPA was charged under its trust

responsibility throughout the negotiations to insure that it protected the environmental interests of the Petitioner. As a fiduciary to the Petitioner, the EPA actions are "subject to the most exacting fiduciary standards." Accordingly, fiduciaries are not entitled to any sort of judicial deference when their actions are called into question. *Seminole Nation v. United States, supra,* 316 U.S. at 297.

The Ninth Circuit has fashioned a broad far reaching precedent directly at odds with the principles of the common law developed fiduciary standards which require the courts to scrutinize the actions of the federal agencies. This decision is likely to generate the application of the deferential standard to agencies other than EPA and in other contexts involving Indian tribes. Moreover, Congress has not enacted a set of statutory prescriptions to bridle or guide EPA's actions for environmental protection regarding tribal lands and resources under a federal statute, and indeed could not as a practical matter. Absent congressional guidance, the trust doctrine principles serve a vital role in providing standards to protect tribal interests against unfettered agency leeway. In this case, the panel granted undue deference to EPA's own interpretation of its trust responsibility which substantially diminishes the force of the trust doctrine as a judicial check to agency action.

The Ninth Circuit seeks justification for its standard of review by stating "deference to the consent decree is due because a district court reviewing a consent decree signed by the United States on behalf of the EPA 'must refrain from second-guessing the Executive Branch. Such deference is appropriate given [t]hat so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered our an agreement at arm's length and advocate its embodiment in a judicial decree." (citation omitted). App. 4a. But the panel's reliance on environmental discretion is misplaced.

Questions of trust obligations owed to Indian tribes by EPA are far removed from the more technical questions of EPA's expertise relating to an environmental consent decree.[7] In this instant case, the question is whether, in light of the trust responsibilities that EPA expressly assumed, it considered all reasonable alternatives and corrective actions, and negotiated a consent decree that best protected the Tribes' interests which are based upon direct information and knowledge of the Tribes' health, safety and welfare, and environment. In short, the Ninth Circuit was requested to review EPA's actions based on its trust obligations not based on the scientific, technical provisions of the RCRA statute.

Furthermore, EPA has no special agency expertise in trust responsibility and fiduciary obligations which would permit the application of a deferential standard of review as applied in the environmental context. *Cf. Udall v. Tallman*, 380 U.S. 1, 16-18, *reh'g denied*, 380 U.S. 989 (1965). This is not purely an environmental consent decree case occurring on private lands and involving the general public. This case involves trust resources and a Tribal government that has a special trust relationship with the United States and its agencies.

The Petitioner is unaware of any prior instance in which a court has reviewed and granted such deference to a federal agency. Indeed, the Court has never applied such a deferential standard to the Bureau of Indian Affairs' actions or decisions relating to implementation of federal laws and regulations impacting tribal lands and people. Certainly, the Bureau of Indian Affairs has more experience and expertise

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[7] Indeed, the trust obligations are memorialized in part by the many treaties negotiated with tribes, and the United States Constitution expressly proclaims such treaties as the "supreme law of the Land." U.S. Const. Art. VI, cl. 2. This constitutional emphasis on the rank of treaties in the federal system of laws certainly suggests a high prioritization of native interests.

than the EPA in exercising its trust responsibility to Indian tribes. The Ninth Circuit's ruling relaxes the standard of review for EPA's actions when exercising its trust responsibilities on Indian lands and impacting tribal people. Consequently, the ruling permits EPA to exercise its trust responsibility to Indian tribes in a manner different than any other federal agency. Consideration of the matter by this Court is essential to address the disparity in application of the trust doctrine among federal agencies.

Finally, the federal government's historical record of protecting tribal rights is remarkably poor. The long pattern of compromise of Indian interests, viewed in light of the vulnerable position of many tribes, gives added justification for enhanced judicial scrutiny. The Ninth Circuit's deference to EPA's determinations relating to their trust responsibility to Indian tribes might well legitimize and institutionalize a disregard for tribal rights and treaty reserved lands. In *Wilderness Soc'y v. Morton,* 479 F.2d 842, 865 (D.C. Cir.), *cert. denied,* 411 U.S. 917 (1973), Judge Skelly Wright stated:

> [I]t is our firm belief that a line must be drawn between according administrative interpretations deference and the proposition that administrative agencies are entitled to violate the law if they do it often enough. Not to draw a line is to make a mockery of the judicial function . . . . 'The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia.'

(*quoting Volkswagen Werk Aktiengesellschaft v. F.M.C.,* 390 U.S. 261, 272 (1968)).

The Ninth Circuit has manufactured a new unprecedented standard of review of deference for a federal agency in the Indian law trust context. The Ninth Circuit has failed to appreciate the significant impact this decision will have in the area of federal Indian law. There is a compelling need for this Court's review.

Conclusion

For the foregoing reasons Petitioner respectfully requests that this petition for writ of certiorari be granted.

Respectfully submitted,

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February 2, 2001

APPENDIX A

[Filed Oct 5, 2000]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-35821
D.C. No. CV-98-00406-BLW

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

SHOSHONE-BANNOCK TRIBES,
Intervenor-Appellant,

v.

FMC CORPORATION,
Defendant-Appellee.

ORDER

Before: HUG, Chief Judge, BRUNETTI, and GOULD, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing. Chief Judge Hug and Judge Gould have voted to deny the petition for rehearing en banc and Judge Brunetti so recommends.

The court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are

DENIED.

APPENDIX B

[Filed Jul. 07, 2000]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-35821
D.C. No. CV-98-00406-BLW

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SHOSHONE-BANNOCK TRIBES,
Intervenor-Appellant,

v.

FMC CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
For the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Argued and Submitted June 6, 2000
Seattle, Washington

MEMORANDUM[1]

Before: HUG, Chief Judge, BRUNETTI, and GOULD, Circuit Judges.

The Shoshone-Bannock Tribes (the "Tribes") as intervenors appeal from entry of a consent decree between the United States and FMC Corporation that resolves claims that FMC violates the Resource Conservation and Recovery Act ("RCRA"). We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

FMC Corporation produces elemental phosphorus at a plant located on fee land within the Shoshone-Bannock Fort Hall Reservation. FMC has historically stored the waste from its plant in ponds. In September 1989 and January 1990, the plant became subject to RCRA regulation. *See* 42 U.S.C. §§ 6901 *et seq.*

In January, 1997, the United States contacted the Tribes' Land Use Commission, the Tribes' legal counsel, and FMC to advise them of the United States' intent to bring an action against FMC for violations of RCRA. At that time, the United States offered to negotiate a settlement of these claims. Although the Tribes were not a party to the suit, they were invited to participate in the negotiations, except those concerning the penalty to be paid by FMC to the United States for RCRA violations. The Tribes were consulted by the EPA in connection with the negotiations. They were provided with proposals and materials obtained from FMC as well as sampling results and drafts of the attachments to the consent decree.

In October, 1998, the United States filed a complaint against FMC simultaneously with the consent decree

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

resolving the claims. The Tribes were granted leave to intervene in May, 1999, at which time they filed an opposition to entry of the consent decree. After reviewing memoranda of law and affidavits from the United States and FMC in response to the Tribes' opposition, the district court approved the consent decree and entered it on July 13, 1999. The Tribes appeal that order.

This court reviews a district court's order entering a consent decree for abuse of discretion. *See United States v. Montrose Chemical Corp.*, 50 F.3d 741, 746 (9th Cir. 1995). This court cannot reverse the order unless the district court "committed a clear error of judgment by failing to apply the correct law or by resting its decision on a clearly erroneous finding of material fact." *Id.* In addition, a second layer of deference to the consent decree is due because a district court reviewing a consent decree signed by the United States on behalf of the EPA "must refrain from second-guessing the Executive Branch. Such deference is appropriate given [t]hat so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length and advocate its embodiment in a judicial decree." *Id.* at 746 (citations and quotation marks omitted).

The Tribes argue that the United States violated its trust duty to the Tribes. We disagree.

We have held that "although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998). RCRA is not aimed specifically at protecting Indian tribes, *see State of Washington, Dept. of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985) ("RCRA does not directly

address the problem of how to implement a hazardous waste management program on Indian reservations."), and thus the United States does not have a specific trust duty to enforce RCRA on fee land within the Tribes' reservation. Moreover, the record disclosed a diligent assertion of RCRA claims by the government, a fair and extensive consultation with the Tribes, and a reasonable settlement reached at arm's length between the government and FMC. The United States therefore satisfied its general trust duty to the Tribes. *See Morongo Band of Mission Indians*, 161 F.3d at 574.

We disagree with the Tribes' assertions of error. The Tribes contend that the FMC waste must be dredged and treated rather than capped in ponds. However, RCRA permits closure of waste ponds either by removing the wastes, or by leaving the wastes in place and installing a protective cap. *See* 40 C.F.R. § 265.228. The Tribes presented no evidence that the ponds must be closed under 40 C.F.R. § 265.312, which applies to landfills, rather than under § 265.228, which applies to surface impoundments. RCRA's Land Disposal Restrictions requiring treatment of the waste do not go into effect for FMC's plant until May 26, 2002, if FMC satisfies the requirements for a two-year extension. 40 C.F.R. § 268.5. Furthermore, the Tribes have presented no evidence that capping the ponds poses a threat to human health or the environment.

The Tribes cannot successfully assert that the specific Supplemental Environmental Projects were unreasonable because there are no existing federal air-pollution regulations currently enforceable against FMC.

While this court has indicated that the EPA should consult potentially affected tribes before taking action, *see State of Washington, Dept. of Ecology*, 752 F.2d at 1472, the EPA has clearly done so here.

None of the other legal grounds asserted by the Tribes show an abuse of discretion by the district court. To the contrary, the record contains ample grounds supporting the EPA's negotiated settlement and its approval by the district court.

WE AFFIRM.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF IDAHO

Civil No. 98-0406-E-BLW

UNITED STATES OF AMERICA,
Plaintiff,

v.

FMC CORPORATION,
Defendant.

ORDER

Before the Court is the application of Plaintiff United States for entry of the Consent Decree lodged on October 16, 1998. The Court has considered all filings made with respect to the application and concludes that the Consent Decree is fair, reasonable, in the public interest, and fulfills the United States' trust responsibilities to Intervenor Shoshone-Bannock Tribes.[1] The court will therefore approve the Consent Decree. A brief explanation of the Court's reasoning follows.

DISCUSSION

The United States brought this action against FMC under the Resource Conservation and Recovery Act ("RCRA"), codified at 42 U.S.C. §§ 6901 *et seq.*, to address the

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[1] This includes the materials filed by Defendant FMC Corporation on June 4, 1999, in reply to Intervenor Shoshone-Bannock Tribes' opposition to the entry of the Consent Decree. The Court inadvertently entered conflicting orders as to the date such a reply would be due. The Court did, however, intend the June 4, 1999, deadline contained in the earlier order to be controlling. Thus, FMC's reply was timely.

treatment, storage, and disposal of hazardous wastes at FMC's elemental-phosphorus plant on the Fort Hall Indian Reservation near Pocatello, Idaho. The United States and FMC reached an agreement to settle the RCRA claims, which they embodied in a proposed Consent Decree lodged with the Court on October 16, 1998. The Shoshone-Bannock Tribes, inhabitants of the Fort Hall Indian Reservation, were later permitted to intervene for the purpose of opposing entry of the Consent Decree.

The essence of the Tribes' opposition to the entry of the Consent Decree is that it does not go far enough to address the environmental problems posed by FMC's operations. Specifically, they contend that (1) FMC should be forced to remove hazardous wastes stored in waste ponds instead of merely capping those ponds, (2) FMC should not be allowed an extended period of time to come into compliance with RCRA, and (3) the air-pollution control measures required in the Consent Decree are neither sufficiently protective nor sufficiently within the control of the United States. Based upon these perceived deficiencies, the Tribes argue that the United States' support of the Consent Decree is in conflict with its trust responsibilities to the Tribes. The United States agrees that it is bound by such trust responsibilities but disagrees as to their scope. Regardless of which view of the scope of the United States' trust responsibilities is correct, the Consent Decree satisfies those responsibilities.

A principle flaw in the Tribes' opposition is that, although the United States' trust responsibilities are significant and important, they do not allow the Tribes to prescribe the environmental-remediation measures the United States should pursue. In part for this reason, the United States' decision to agree to capping of the waste ponds is sufficient to fulfill its responsibilities to the Tribes. The Court is convinced that the capping requirements are adequately environmentally protective—the record contains no legitimate basis on which

the Court could conclude that capping allows an unreasonable health risk to go unchecked. Finally, the likelihood of procuring FMC's agreement to capping, thereby avoiding lengthy and costly litigation of uncertain result, was much greater than the likelihood of inducing FMC to agree to remove the wastes from the reservation. The capping requirements are therefore reasonable and in the public interest.

The Tribes also intimate that FMC should have been required to cease producing hazardous wastes while undertaking efforts to comply with the other terms of the Consent Decree. In other words, the Tribes appear to argue that the United States should have sought to shut down FMC's plant until FMC was able to construct on-site facilities to treat the wastes its everyday operations produce. It is difficult to see how such a draconian measure would be in the public interest. Hundreds of jobs would be lost at FMC alone and, because of FMC's prominent position in the phosphorus industry, phosphorus shortages on a national or international scale could be expected, negatively impacting many other industries. The United States' trust responsibilities to the Tribes do not require it to ignore the broader social and economic ramifications of its demands. It was reasonable for the United States to have agreed to allow FMC a period of time to come into compliance with RCRA, particularly since the period allowed is intended to track the time necessary for FMC to complete on-site waste-treatment facilities.

With respect to the air-pollution control measures, called supplemental environmental projects ("SEPs"), the Tribes' concerns are defeated largely by the fact that there are no existing federal air-pollution regulations enforceable against FMC. Thus, the United States could not have forced FMC to perform the SEPs, or more expansive air-pollution control measures, through litigation. Although FMC will eventually be subject to an enforceable regulatory scheme with respect

to air emissions, it was reasonable for the United States to accept as part of the RCRA settlement FMC's agreement to now begin efforts at curbing air emissions. While the SEPs agreed to may or may not be sufficiently far-reaching to satisfy the regulations to which FMC will eventually be subject, the circumstances make it very difficult for the Court to say that the United States was required to obtain more in order to settle its RCRA claims.

In sum, the Court concludes that the United States has fairly balanced the need to remedy the environmental damage caused by FMC and addressed by RCRA, the desirability of immediately requiring FMC to begin efforts at reducing its air-pollutant emissions, and its trust responsibilities to the Tribes against the delay, expense, and uncertainty of the litigation and the economic dislocation that would have come with seeking everything the Tribes demand. The Consent Decree is approved.

ORDER

In accordance with the views expressed above,

IT IS ORDERED that the settlement embodied in the Consent Decree is fair, reasonable, in the public interest, and fulfills the United States' trust responsibilities to the Shoshone-Bannock Tribes; the United States' motion for entry of the Consent Decree (Docket No. 4) is GRANTED. The Consent Decree is entered as an order of this Court.

DATED this 13th day of July, 1999.

/s/ B. Lynn Winmill
B. LYNN WINMILL
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
APR 5 2001

(2)

No. 00-1262

In the Supreme Court of the United States

SHOSHONE-BANNOCK TRIBES, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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25pp

QUESTION PRESENTED

Whether the United States may resolve an enforcement action under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, against the non-Indian owner of a facility on fee land within the boundaries of the Shoshone-Bannock Indian reservation by entering into a consent decree that is consistent with RCRA and federal regulations and was negotiated in consultation with the Shoshone-Bannock Tribes, but that does not contain all the terms desired by the Tribes.

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In the Supreme Court of the United States

No. 00-1262

SHOSHONE-BANNOCK TRIBES, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-6a) is unpublished, but the decision is noted at 229 F.3d 1161 (Table). The decision of the district court (Pet. App. 7a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2000. A petition for rehearing was denied on October 5, 2000 (Pet. App. 1a). On December 19, 2000, Justice O'Connor extended the time in which to file a petition for a writ of certiorari to and including February 2, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Solid Waste Disposal Act (SWDA), as amended by the Resource Conservation and Recovery Act of 1976 (RCRA) and the Hazardous and Solid Waste Amendments of 1984 (HSWA), see 42 U.S.C. 6901 *et seq.* (hereinafter referred to collectively as RCRA), was enacted to address the increasingly serious environmental and public health dangers arising from waste generation, management, and land disposal. 42 U.S.C. 6901(b). Congress was particularly concerned about the management and disposal of hazardous wastes. See H.R. Rep. No. 1491, 94th Cong., 2d Sess. Pt. I, at 2-3 (1976). Congress required the Environmental Protection Agency (EPA) to implement a national regulatory program to ensure that hazardous-waste management practices are conducted in a manner that protects human health and the environment, and to minimize the generation and land disposal of hazardous wastes. See *id.* at 21-26.

RCRA governs two types of waste: solid waste and hazardous waste. "[S]olid waste" includes "any garbage, refuse, sludge * * * and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations." 42 U.S.C. 6903(27); see 40 C.F.R. 261.2. Solid waste is regulated under Subtitle D of RCRA, 42 U.S.C. 6941-6949a (1994 & Supp. IV 1998). "[H]azardous waste" is a subset of solid waste, consisting of those wastes that may "significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness," or that may pose "a substantial present or potential hazard to human health or the environment when improperly treated, stored,

transported, or disposed of, or otherwise managed." 42 U.S.C. 6903(5); see 40 C.F.R. 261.3. Hazardous wastes further fall into two classes: "listed" wastes, which contain certain identified toxic constituents, and "characteristic" wastes, which exhibit one or more of the characteristics of ignitability, corrosivity, reactivity, and toxicity. 42 U.S.C. 6921; see 40 C.F.R. Pt. 261. Hazardous waste is regulated under Subtitle C of RCRA, 42 U.S.C. 6921-6939e (1994 & Supp. IV 1998).

For materials falling within the regulatory definitions, EPA regulations establish "a 'cradle-to-grave' regulatory structure overseeing the safe treatment, storage and disposal of hazardous waste." *United Technologies Corp.* v. *EPA*, 821 F.2d 714, 716 (D.C. Cir. 1987). Those EPA regulations establish strict requirements for all matters relating to the handling of hazardous wastes, including record keeping, permits, treatment, storage, disposal, and transportation. 42 U.S.C. 6922-6925 (1994 & Supp. IV 1998). RCRA also establishes restrictions on the land disposal of certain hazardous wastes. 42 U.S.C. 6924(d). Those land disposal restrictions (LDRs) prohibit the placement of hazardous wastes on the land unless such wastes either comply with treatment levels specified by EPA or are determined by EPA to be protective of human health and the environment based on a petitioner's demonstration that there will be "no migration" of hazardous constituents from the disposal unit for as long as the wastes remain hazardous. 42 U.S.C. 6924(d)(1). EPA regulations governing land disposal of hazardous wastes additionally require comprehensive waste analysis and recordkeeping to certify that a waste is eligible for land disposal (40 C.F.R. 268.7), specify procedures for obtaining exemptions (40 C.F.R. 268.6),

and specify treatment standards for the land disposal of restricted wastes (40 C.F.R. Pt. 268, Subpt. D).

As originally enacted, RCRA exempted from EPA regulation certain kinds of wastes. The Bevill Amendment, 42 U.S.C. 6921(b)(3)(C), 6982(p), directed EPA to study those exempted wastes before determining whether they should be regulated under the RCRA scheme. Those wastes exempted by the Bevill Amendment included the process wastes generated from the beneficiation and processing of minerals and ores. On September 1, 1989, the Bevill exemption was removed for all wastes from the production of elemental phosphorous, with the exception of furnace off-gas solids, for which the exemption was removed on January 23, 1990. See 54 Fed. Reg. 36,592; 55 Fed. Reg. 2322. Those wastes then became subject to full regulation under RCRA. EPA regulations prescribe, for such wastes newly subject to regulation under RCRA, a period of four years during which a facility must either bring surface impoundments storing such wastes into compliance with minimum technology requirements or cease the storage or disposal of hazardous waste in such ponds and commence closure. See 40 C.F.R. 265.221(h).

2. The United States initiated this enforcement action against respondent FMC Corporation for violations of RCRA at its elemental phosphorus production facility near Pocatello, Idaho. The FMC facility is located on 150 acres of land owned in fee by FMC within the boundaries of the Fort Hall Indian Reservation. See *FMC* v. *Shoshone-Bannock Tribes*, 905 F.2d 1311, 1312 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991).[1] The RCRA violations alleged by the United

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[1] Pursuant to 42 U.S.C. 6926, upon application by a State, EPA may authorize the State's hazardous-waste management program

States relate principally to FMC's failure to meet regulatory requirements for the management of hazardous wastes newly subject to RCRA, and in particular its management of such wastes in surface impoundments that do not meet RCRA requirements. Petitioner presented no evidence in district court that FMC's violations of RCRA have had any effect on human health or the environment outside the boundaries of the FMC facility. See Pet. App. 5a, 8a-9a.

3. In January 1997, after the complaint in this case obtained administrative approval within the Department of Justice, the government contacted the Tribes' Land Use Commission and legal counsel to invite the Tribes' participation in negotiations with FMC, pursuant to Executive Order No. 12,778, 56 Fed. Reg. 55,195 (1991). Representatives of the federal government also met with representatives of the Tribes, including counsel for the Tribes and members of the Business Council, the Tribes' governing body, to discuss the violations and the anticipated negotiation process.[2] The

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to operate in lieu of the federal program. Once a State's hazardous-waste management program has been authorized, it is enforceable by both the State and EPA. See 42 U.S.C. 6926, 6928. RCRA does not, however, authorize such state regulation of hazardous wastes on Indian reservations. See *Washington Dep't of Ecology* v. *EPA*, 752 F.2d 1465 (9th Cir. 1985). Accordingly, there is no authorized state program that operates in lieu of the federal RCRA program on the Fort Hall Indian reservation, and so the federal RCRA program is applicable. See 40 C.F.R. 271.1(h).

[2] The Tribes' suggestion (Pet. 4) that the Tribal governing decision-making body was never consulted by EPA is contradicted by the record, which shows that, on February 26, 1997, even before the government's first negotiating session with FMC, representatives of the federal government met with the Tribes' Land Use Commission, counsel for the Tribes, and various members of the Business Council, the Tribes' governing body, to discuss the viola-

Tribes participated fully in the United States' subsequent negotiations with FMC relating to injunctive relief and potential Supplemental Environmental Projects (SEPs), which are projects not otherwise required by any law that can result in penalty mitigation.[3] The negotiations spanned approximately 18 months, during which the Tribes were provided with all proposals and materials obtained from FMC, sampling results, and drafts of the attachments to the Consent Decree setting forth the injunctive relief and SEPs. See Gov't C.A. Supp. E. R. 36-40, 127-133 (responses to comments and affidavits describing EPA contacts with Tribes). The Tribes also were consulted privately by EPA in connection with the negotiations, and were regular participants in meetings and discussions with FMC regarding both injunctive relief and SEPs. Pet. App. 3a. The only discussions with FMC that were not open to the Tribes concerned the penalty amount to be paid by FMC to the United States as a result of its violations of federal law. *Ibid.*

4. In the settlement that emerged from the negotiations, FMC agreed to injunctive relief estimated to cost

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tions and the anticipated negotiation process. See Pet. App. 3a-4a (referring to memoranda and affidavits filed with the district court that documented the United States' contacts with the Tribes).

[3] SEPs are environmentally beneficial projects that a defendant undertakes in settlement of an enforcement action, but which the defendant is not otherwise legally required to perform. Under EPA's Supplemental Environmental Project Policy, EPA in some circumstances may mitigate civil penalties in settlement of an enforcement action if the defendant agrees to conduct an environmentally beneficial project not required by any law. See 63 Fed. Reg. 24,796 (1998). Such projects must be prompted by the enforcement action and must exhibit an appropriate nexus to the alleged violations.

more than $100 million, including the management of all wastes containing phosphorus as ignitable and reactive hazardous wastes, the construction of a waste treatment plant to render the facility's phosphorus waste non-hazardous and to comply with the LDR regulations (the LDR Treatment System), the closure of its illegal ponds according to various requirements, and compliance with RCRA regulations requiring secondary containment systems for tanks and pipes storing and carrying hazardous wastes. The Tribes issued permits to FMC for the continued operation of certain ponds pending completion of the LDR Treatment System. FMC further agreed to pay a civil penalty of $11,864,800, and committed to perform a number of SEPs to reduce particulate emissions from FMC by approximately 67%, or approximately 436 tons per year, with an estimated cost of $64 million. The SEPs also include a health-assessment project for the benefit of the Tribes valued at $1.65 million. See generally Pet. C.A. E. R. 32-127 (Consent Decree).

Following a request by the Tribes to share in the penalty to be paid by FMC under the Consent Decree, EPA representatives met with the Tribes, and the United States subsequently agreed to delay signing and lodging the Consent Decree so that options for penalty sharing with the Tribes could be further explored. The United States then offered the Tribes an opportunity to become a formal party to the legal action by joining their own tribal claims with the federal claims and resolving those claims through the Consent Decree, which would allow the penalty to be shared with the Tribes.[4] See Gov't C.A. Supp. E. R. 41-42. The Tribes

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[4] EPA's policy about penalty sharing, as set forth in EPA's memorandum entitled *Division of Penalties with State and Local*

declined that offer, however, and raised objections to the injunctive relief and SEPs embodied in the Consent Decree.

5. On October 16, 1998, the United States filed the Complaint against FMC and lodged the proposed Consent Decree with FMC resolving the government's claims. Pet. App. 7a. Consistent with Department of Justice regulations, 28 C.F.R. 50.7(a), the United States then provided the public an opportunity to comment before seeking entry of the Consent Decree. 63 Fed. Reg. 58,770 (1998) (establishing thirty-day comment period); *id.* at 66,582 (extending comment period). EPA also published notice of the settlement in the *Idaho State Journal* and *Sho-Ban News*, and conducted public sessions in Pocatello, Idaho, and on the Shoshone-Bannock Fort Hall Reservation, to answer questions about the Consent Decree. See Gov't C.A. Supp. E. R. 4. The Tribes submitted objections to the Consent Decree during the public comment period. See *id.* at 4-5. The United States formally responded to all comments in writing and, on March 29, 1999, moved to enter the Consent Decree in the district court, presenting both the comments and the responses to the district court.

Governments (Oct. 30, 1985), permits the sharing of "civil penalties that result from [state and local governments'] participation, to the extent that penalty division is permitted by federal, state, and local law, and is appropriate under the circumstances." The Memorandum notes, however, that penalty sharing outside its guidelines may run afoul of 31 U.S.C. 3302, which requires that "funds properly payable to the United States must be deposited in the Treasury." See *Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General (In re Steuart)*, 4B Op. Off. Legal Counsel 684 (1980); *Emery* v. *United States*, 186 F.2d 900, 902 (9th Cir.), cert. denied, 341 U.S. 925 (1951).

The Tribes intervened and opposed entry of the Consent Decree. The Tribes objected to the Consent Decree because it allows FMC to come into RCRA compliance over a period of several years, it allows waste in all but one of the ponds to be capped in place without deactivating and stabilizing the waste, and it does not dictate waste-treatment methods or additional requirements for air-pollution reduction SEPs. The Tribes asserted that the United States had breached a special trust responsibility to the Tribes in agreeing to those aspects of the settlement. The United States argued in response that RCRA, as a statute of general application, does not create any special rights for Tribes in connection with the enforcement of federal law, and that its inclusion of and consultation with the Tribes throughout negotiations fully satisfied its general trust responsibility to the Tribes.

6. On July 13, 1999, the district court approved and entered the Consent Decree. The court ruled that the Consent Decree is "fair, reasonable, [and] in the public interest," Pet. App. 10a, notwithstanding the opposition of the Tribes. On the matter of the United States' trust responsibility to the Tribes the court ruled that, "[r]egardless of which view of the scope of the United States' trust responsibilities is correct, the Consent Decree satisfies those responsibilities." *Id.* at 8a. The court explained that "[a] principle [*sic*] flaw in the Tribes' opposition is that, although the United States' trust responsibilities are significant and important, they do not allow the Tribes to prescribe the environmental-remediation measures the United States should pursue." *Ibid.* The district court further noted that "the record contains no legitimate basis on which the Court could conclude that capping [the waste storage ponds] allows an unreasonable health risk to go

unchecked." *Id.* at 8a-9a. The court also rejected the Tribes' claims that the air pollution reduction projects recognized as SEPs in the Decree were insufficient. *Id.* at 9a-10a. Given the lack of federal air-pollution regulations for particulate air emissions then enforceable against FMC, the court concluded that it was "very difficult for the Court to say that the United States was required to obtain more in order to settle its RCRA claims." *Id.* at 10a.

7. The court of appeals affirmed. Pet. App. 2a-6a. The court held that, while the United States has a "general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes," and that RCRA is not a statute "aimed specifically at protecting Indian tribes." *Id.* at 4a. The court noted that it "has indicated [in prior cases] that the EPA should consult potentially affected tribes before taking action," but held that "the record disclosed a diligent assertion of RCRA claims by the government, a fair and extensive consultation with the Tribes, and a reasonable settlement reached at arm's length between the government and FMC." *Id.* at 5a. Accordingly, the court ruled that "[t]he United States * * * satisfied its general trust duty to the Tribes." *Ibid.*

ARGUMENT

The court of appeals correctly held that the United States' trust responsibility to petitioner was fully discharged by its compliance with generally applicable federal statutes and regulations in enforcing RCRA by entering into a consent decree with respondent FMC.

Moreover, nothing in RCRA or this Court's decisions suggests that judicial deference to agency expertise in the implementation of a complex statute such as RCRA should be abandoned when the party challenging that implementation is an Indian Tribe. Nor does the court of appeals' decision conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner principally contends (Pet. 6-13) that, in enforcing RCRA against FMC based on FMC's violations of the statute within the boundaries of an Indian reservation, the United States was obligated to go beyond merely a proper adherence to RCRA and its implementing regulations, and was bound to engage in a form of heightened implementation of the statute and regulations. Petitioner bases that claim on the United States' "unique trust relationship" to Indian Tribes. See *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 247 (1985); see also *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). That unique trust relationship that the Court has recognized, however, does not require the federal government, when it is implementing generally applicable federal statutes, to follow an enforcement policy for the benefit of Indian Tribes that is different from its enforcement policy for the benefit of the general public.

In cases where this Court has found a heightened trust obligation on the part of the United States to act for the benefit of Indian Tribes, the federal government was charged with administering statutes or regulations that were enacted for the special benefit of Tribes or their members. For example, in *United States* v. *Mitchell*, 463 U.S. 206 (1983), the Court recognized a cause of action for money damages against the United States arising out of a violation of the trust relationship

between Indian Tribes and the United States. That recognition, however, provides no support for petitioner's claim in this case. In *Mitchell*, the Indians seeking damages against the United States predicated their claims on specific statutes and regulations that gave the federal government "responsibility to manage Indian resources and land for the benefit of the Indians." *Id.* at 224. Thus, the cause of action recognized in *Mitchell* was limited by the requirements of the federal statutory and regulatory provisions setting out the particular governmental responsibility. As the Court explained in *Mitchell*, such statutes and regulations both "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Ibid.* Accordingly, the United States may be required to compensate Indian Tribes whose resources it manages for any damages resulting from a breach of its trust obligation if, but only if, a fiduciary relationship has been established and defined by statute or regulation. *Id.* at 226.

The precondition that a specific obligation to Indians be established by positive law is fatal to petitioner's claim in this case. RCRA was not enacted for the specific protection of Tribes or tribal lands. It is, rather, a statute of general application. RCRA also does not create any specific obligations to Indian Tribes analogous to those created by the statutes addressed in *Mitchell*, and it does not impose any obligations or duties on the United States toward Tribes beyond the duties imposed on the United States generally with respect to all citizens.

Petitioner argues (Pet. 14) that, in *Morton* v. *Ruiz*, 415 U.S. 199 (1974), this Court imposed a duty to adhere to special, heightened trust standards when the government's enforcement of a federal statute

implicates tribal interests. That reliance on *Ruiz* is misplaced for the same reason that petitioner's reliance on *Mitchell* is in error. *Ruiz* involved the Snyder Act, 25 U.S.C. 13, a statute enacted for the special benefit of tribal members, and the Court's decision in that case turned on the appropriate interpretation of that statute's coverage. See 415 U.S. at 205-206. The Court held that the Secretary of the Interior was required to promulgate regulations before excluding from eligibility for assistance payments Indians who had a legitimate expectation of eligibility to receive benefits under a statute enacted for the benefit of Indians. See *id.* at 236. This case, unlike *Ruiz*, does not involve a statute enacted for the special benefit of Indians or any claim that the agency failed to comply with its own internal procedures.

Petitioner contends (Pet. 6-7), however, that a heightened duty of the United States to Tribes under RCRA may be inferred from the fact that RCRA may be enforced on Indian reservations only by the United States, whereas the statute allows States to apply for federal authorization of their own hazardous-waste programs, which then operate in lieu of the federal program if the state program is approved by EPA as "equivalent to the Federal program." See 42 U.S.C. 6926(b). But the fact that RCRA does not establish a program for either tribal or state hazardous-waste programs to be authorized and operate in lieu of implementation of federal requirements on tribal lands does not create a federal trust obligation comparable to management of tribal land or resources for the special benefit of a Tribe. RCRA does not grant the United States a role in enforcing RCRA Subtitle C in Indian country that is different from, or greater than, the federal RCRA Subtitle C program outside Indian

country. Moreover, the federal government has the same authority to enforce RCRA nationwide, even in States with authorized programs. 42 U.S.C. 6928(a)(2). And RCRA does not mandate specific enforcement actions in Indian country or anywhere else. See 42 U.S.C. 6928(a)(1) (EPA "may" take enforcement action upon learning of violation). RCRA therefore does not create in the United States a special trust obligation to Tribes in the implementation and enforcement of RCRA.[5]

The court of appeals' decision is consistent with a long line of similar decisions in the courts of appeals holding that, absent special statutes or regulations like those at issue in *Mitchell* that create a particular trust duty, the United States satisfies its trust responsibility to Indian Tribes through the proper implementation and enforcement of generally applicable federal law.[6]

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[5] Nor are the Tribes wholly dependent upon the United States for the regulation of hazardous waste on reservation lands. While a tribal program, unlike a state program, may not be authorized to operate "in lieu of" federal regulations under RCRA, see 42 U.S.C. 6926(b), nothing in RCRA affects a Tribe's ability to establish its own waste programs and enforcement authorities. See *Backcountry Against Dumps* v. *EPA*, 100 F.3d 147, 151 (D.C. Cir. 1996) (although EPA could not approve tribal solid waste management plan, "[w]ith its comprehensive environmental codes and an agency and court devoted solely to enforcing tribal and federal environmental regulations, the tribe has as much authority to create and enforce its own solid waste management plan as it ever had"); *Washington Dep't of Ecology*, 752 F.2d at 1471 (recognizing a "federal commitment to tribal self-regulation in environmental matters"). Tribes also have the right to institute citizen suits against an alleged offending facility. 42 U.S.C. 6972; see *Backcountry Against Dumps*, 100 F.3d at 152.

[6] See *Osage Tribal Council* v. *United States Dep't of Labor*, 187 F.3d 1174, 1183-1184 (10th Cir. 1999) (holding that Tribes did not

And no court of appeals decision holds that the United States must adhere to a special, heightened trust obligation to Indian Tribes when it is enforcing a generally applicable statutory provision in a situation that affects members of the Tribe.

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identify any breach of the Secretary of Labor's fiduciary duty to Tribe in "carrying out his duties with respect to Congress' mandate on safe drinking water"), cert. denied, 120 S. Ct. 2657 (2000); *Morongo Band of Mission Indians* v. *FAA*, 161 F.3d 569, 574 (9th Cir. 1998) ("[U]nless there is a specific duty that has been placed on the government with respect to Indians, this [trust] responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."); *Skokomish Indian Tribe* v. *FERC*, 121 F.3d 1303, 1309 (9th Cir. 1997) (the "Tribe's permit application is barred by FERC's regulations, and the federal trust responsibility does not compel its acceptance"); *Shoshone-Bannock Tribes* v. *Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) ("[A]n Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty."); *Pyramid Lake Paiute Tribe of Indians* v. *United States Dep't of the Navy*, 898 F.2d 1410, 1418-1421 (9th Cir. 1990) (holding that Navy satisfied trust responsibility to Tribe to preserve and protect fishery through actions compelled by the Endangered Species Act, and was not obligated as a matter of trust responsibility to adopt alternative conservation proposals advanced by the Tribe); *Washington Dep't of Ecology*, 752 F.2d at 1472 (holding that EPA may promote tribal participation in hazardous waste management under RCRA but "need not delegate its full authority to the tribes"); *Nance* v. *EPA*, 645 F.2d 701, 711 (9th Cir.) (holding that EPA fulfilled its trust responsibility to the affected Tribes by performing its responsibilities under the Clean Air Act before approving air quality redesignation), cert. denied, 454 U.S. 1081 (1981); cf. *North Slope Borough* v. *Andrus*, 642 F.2d 589, 612 (D.C. Cir. 1980) ("Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only.").

2. Petitioner also contends (Pet. 13-18) that the court of appeals erred in applying a deferential standard of review to the government's determination to implement RCRA in this case by entering into a consent decree with FMC. That deferential approach was entirely proper. In light of EPA's responsibilities, assigned to it by Congress, to evaluate the environmental consequences of a RCRA violation and any remedy ordered against the violator, as well as to balance important interests in deciding how to implement a complex statute like RCRA, "a district court reviewing a consent decree signed by the United States on behalf of the EPA must refrain from second-guessing the Executive Branch" in evaluating the proper means to enforce such a complex statute. Pet. App. 4a (internal quotation marks omitted). Moreover, there is no basis in this case for departing from the long-established proposition that the expertise of an agency charged with administering a highly technical statute is entitled to deference. See *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983). Accordingly, the courts generally "decline * * * to assess the wisdom of the Government's judgment in negotiating and accepting [a] * * * consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." *Sam Fox Publ'g Co.* v. *United States*, 366 U.S. 683, 689 (1961).

The United States entered into this settlement upon concluding that any compromises made to achieve settlement and to avoid litigation on difficult issues will not jeopardize either human health or the environ-

ment.[7] As both the district court and the court of appeals noted, petitioner presented no evidence to the contrary. Pet. App. 5a, 8a-9a. The lower courts therefore properly deferred to EPA's environmental expertise in determining that the consent decree was fair, reasonable, and in the public interest. Moreover, because (as we have explained, pp. 12-14, *supra*) RCRA establishes no special statutory trust responsibility on the part of the United States to Indian Tribes, the question for the lower courts in deciding whether to approve the Consent Decree was whether EPA fulfilled its general trust responsibilities by implementing RCRA faithfully and in consultation with the Tribes. Petitioner contends that the United States' trust relationship with Indian Tribes imposed a specific responsibility on the part of the government to negotiate a consent decree that "best protect[s] the Tribes' interests" (Pet. 17), but petitioner points to no authority for that proposition, and indeed the courts are neither

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[7] In particular, the settlement will require FMC to achieve RCRA compliance—based on EPA's interpretation of RCRA's requirements—much faster than would litigation, and provide substantial relief from air pollution that could not be legally compelled. Cf. *United States* v. *Georgia-Pac. Corp.*, 960 F. Supp. 298, 299 (N.D. Ga. 1996) (approving a consent decree that was "technically adequate," obtained compliance "in a far shorter time than if the parties had litigated the action," and included SEPs to "improve the air quality in the regional area impacted by the alleged violations"); *United States* v. *Hooker Chem. & Plastics Corp.*, 540 F. Supp. 1067, 1075-1076 n.4, 1080 (W.D.N.Y. 1982) (approving consent decree requiring injunctive relief to control migration of chemicals in the groundwater, including use of temporary storage lagoons, which resolved claims on which "plaintiffs have no guarantee of ultimate success," thus achieving valuable environmental results "without the expenditure of considerable time, money, and effort in litigation"), aff'd, 749 F.2d 968 (2d Cir. 1984).

required nor authorized to substitute such scrutiny for the traditional deference given Executive Branch agencies in interpreting and implementing complex statutes such as RCRA.

Contrary to petitioners' suggestion that the lower courts erroneously deferred to EPA as an expert on Indian affairs (Pet. 17-18), those courts invoked well-established principles of judicial deference to agency expertise in assessing scientific and technical matters and in reviewing settlements based on that expertise. See, *e.g.*, *United States* v. *Cannons Eng'g Group*, 899 F.2d 79, 90 (1st Cir. 1990) (with respect to assessment of cleanup costs, "[i]f the figures relied upon derive in a sensible way from a plausible interpretation of the record, the court should normally defer to the agency's expertise"); *Conservation Law Found., Inc.* v. *Franklin*, 989 F.2d 54, 59 (1st Cir. 1993) ("[W]e recognize a strong and clear policy in favor of encouraging settlements, especially in complicated regulatory settings.") (internal quotation marks omitted); see also *United States* v. *Oregon*, 913 F.2d 576, 581 (9th Cir. 1990) (noting that those objecting to such a settlement have "a heavy burden of demonstrating that the decree is unreasonable"), cert. denied, 501 U.S. 1250 (1991).[8] The

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[8] The Department of Justice also possesses relevant expertise in evaluating when a case should be settled rather than litigated. See *United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113, 117 (8th Cir.) (Attorney General has discretion in "controlling government litigation and in determining what is in the public interest."), cert. denied, 429 U.S. 940 (1976); *United States* v. *Akzo Coatings, Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991) (recognizing a presumption in favor of government-negotiated settlements that is "particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative

court deferred to EPA in its role as evaluator of the environmental consequences of the identified RCRA violations and the measures undertaken by FMC to remedy those violations, not in any role (which EPA did not assume) as expert on Indian law or trust law. And because the lower courts properly deferred to EPA's assessment of those environmental consequences, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2001

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agency like EPA which enjoys substantial expertise in the environmental field").

Supreme Court, U.S.
FILED
APR 6 2001
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No. 00-1262

IN THE

Supreme Court of the United States

SHOSHONE-BANNOCK TRIBES,

Petitioner,

v.

UNITED STATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT FMC CORPORATION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, FMC Corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

We supplement the facts in the Petition as follows. Since 1947, FMC Corporation ("FMC") has owned approximately 1,500 acres of land near Pocatello, Idaho (the "FMC Property"). The FMC Property is located near the eastern boundary of the Shoshone-Bannock Fort Hall Indian Reservation, with approximately 1,000 of those acres lying within the Reservation. The FMC Property is not owned by the United States for the benefit of the Shoshone-Bannock Tribes ("Tribes") or any of their members, is not owned in fee by the Tribes or any of their members, and is not leased by the United States to the Tribes or FMC. Non-Indians own most of the land immediately north, west and east of the FMC Property in fee. Very few people live on the land surrounding the FMC Property and nearly all of those people are non-Indians.

Since 1949, FMC has used the FMC Property, including both on-reservation lands and off-reservation lands, for operation of FMC's Pocatello elemental phosphorus plant (the "FMC Pocatello Plant")[1] Mineral processing wastes generated at the FMC Pocatello Plant first became subject to the Resource Conservation and Recovery Act ("RCRA") hazardous waste regulations in September 1989 and January 1990.[2] (ER 1 at ¶ 8.) Because RCRA is not retroactive, these

1. FMC transferred ownership and operation of the Pocatello facility to Astaris Idaho LLC, a joint venture formed by FMC and Solutia, Inc., in April 2000. The consent decree that is the subject of the Shoshone-Bannock Tribes' current petition requires a number of environmental measures at the Pocatello facility. FMC remains obligated to carry out these consent decree requirements notwithstanding the facility transfer to Astaris.

2. RCRA, 42 U.S.C. § 6901, was enacted in 1976 but implementing regulations did not become effective until (Cont'd)

requirements apply only to FMC's storage, treatment and disposal of mineral processing wastes generated after September 1989.

I. Consent Decree Negotiations.

In January 1997, the United States notified FMC that it intended to bring an action against FMC in the United States District Court for the District of Idaho for violations of RCRA. The United States Environmental Protection Agency ("EPA"), the United States Department of Justice ("DOJ") and FMC began settlement negotiations. The Tribes, represented by Tribal attorneys, environmental experts and Tribal members, participated actively in the settlement negotiations, and made specific requests to the United States and FMC regarding requirements the Tribes wanted to be included as part of any settlement between the United States and FMC. (CR 8 at 17; CR 15 at 4-6, 17-18.) The United States supported many requirements requested by the Tribes, and those requirements became key elements of the Consent Decree, including: (a) the requirement that FMC remove and treat wastes placed in Pond 18; (b) more stringent capping requirements for ponds; (c) pond management requirements designed to minimize risks associated with operation of ponds, including electronic leak detection, perimeter gas monitoring, and bird protection measures; (d) certain requirements of the air emission reduction Supplemental

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(Cont'd)
November 19, 1980. Until 1989, FMC Pocatello Plant mineral processing wastes were exempt from RCRA hazardous waste regulations under the Bevill Amendment. In September 1989 and January 1990, certain of FMC's mineral processing wastes became subject to RCRA, with the remaining portion still exempt under the Bevill Amendment. (ER 1 at ¶ 18.)

Environmental Projects (SEPs); and (e) the Tribal Health Assessment SEP. (CR 15 at 14, 18.) In every case, the Tribes' requested requirements were the subject of discussion and negotiation before a decision was made to include, or not include, the Tribes' request as a Consent Decree requirement. (CR 23 at 2.)

In October 1998, the United States and FMC reached a settlement agreement, the terms of which are set forth in the Consent Decree. On October 16, 1998, the United States filed its Complaint and lodged the proposed Consent Decree. The United States then published a notice regarding the Consent Decree and its availability for public comment in the *Federal Register* on November 2, 1998. 63 Fed. Reg. 58770. Notices of the Consent Decree and public comment period were also published in the *Idaho State Journal* and in the *Sho-Ban News*, the Tribes' newspaper. (SER 1.) At the request of the Tribes, the United States extended the initial 30-day period for public comment for an additional 15 days, extending the comment deadline from December 3, 1998 to December 18, 1998. 63 Fed. Reg. 66582.

EPA received written public comments and held public meetings on the Consent Decree in the City of Pocatello and at the Fort Hall Indian Reservation. The United States also met with representatives of the Tribes' Business Council. EPA and DOJ responded in writing to all public comments, including all comments received from the Tribes and Tribal members. *See United States v. FMC Corporation, Inc.* Proposed Consent Decree: Response to Public Comments. (SER 1-126.)

II. Consent Decree Requirements.

The Consent Decree covers only violations alleged in the Complaint relating to storage, treatment and disposal of FMC's mineral processing wastes generated *after* September 1989 and January 1990, the dates on which FMC's mineral processing wastes first became subject to the RCRA hazardous waste regulations. Other environmental impacts of the FMC Pocatello Plant operations are being addressed under the Comprehensive Environmental Response Compensation and Liability Act (EPA has issued a Record of Decision, currently being reviewed to address Tribal concerns, that will require remedial actions to address soil and groundwater contamination from historic releases of hazardous substances), the Clean Air Act (EPA has issued a Federal Implementation Plan that sets specific emission limits and air monitoring requirements for the Pocatello facility[3]), the Clean Water Act and other State and federal statutes.

The RCRA Consent Decree requires FMC to (1) make more than $150 million in capital improvements and operating changes that will assure full RCRA compliance at the FMC Pocatello Plant according to specific compliance schedules set forth in the Consent Decree; and (2) perform Supplement Environmental Projects not otherwise required by State or federal law that will reduce particulate air emissions from the FMC Pocatello Plant by approximately 67%, and that will fund a $1.65 million health assessment of the Shoshone-Bannock Tribes Fort Hall Reservation residents – a study the Tribes approved and will manage jointly with FMC.

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3. 40 C.F.R. § 49.10711 (65 Fed. Reg. 51412, August 23, 2000).

The Consent Decree is a settlement of disputed claims. FMC does *not* admit the violations alleged in the Complaint, or even that its wastes are subject to regulation under RCRA, and the United States has not proven the truth of its allegations. *See* ER at 33, "Whereas" clause at 2.[4]

EPA determined that the Consent Decree's requirements are protective of human health and the environment. For example, RCRA permits closure of ponds either by removing the wastes or by leaving the wastes in place and installing an appropriate protective cap. 40 C.F.R. § 265.22. Prior to approving closure in place and capping of FMC ponds, EPA determined that (1) it would be technically difficult to remove and treat wastes already disposed in ponds; (2) it would not be safe to remove pond wastes off-site for treatment; (3) the risk associated with leaving the wastes in place was minimal; and (4) groundwater, soil and sediment sampling data confirmed that the wastes stored in active ponds were not migrating from the ponds and contaminating groundwater or surface water. (SER at 17-18.) To provide an added level of assurance, the Consent Decree requires FMC to install

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4. In order to secure the injunctive relief provided by the Consent Decree, the United States would have to establish first that FMC's wastes are "ignitable" or "reactive" wastes subject to regulation under RCRA. Under RCRA, a solid waste is "hazardous" if it is listed as such in the RCRA regulations, or if the waste exhibits certain "characteristics" such as those for "ignitability" or "reactivity". RCRA does not list FMC's wastes as hazardous; and the RCRA regulations do not specify a test method for "ignitability" or "reactivity" that apply to FMC's wastes. (SER at 135.) FMC if necessary would litigate the classification of its wastes as ignitable or reactive and, given the lack of prescribed test methods and numerical standards for making these designations, would expect to prevail on its position that the Pocatello wastes are not ignitable or reactive characteristic wastes.

caps that are more protective than normally required for RCRA closure. The cap design selected by EPA is comparable to those used for radioactive waste landfills which may be dangerous for thousands of years. (SER at 18-19.)

Further, the Consent Decree requires that FMC cease placing wastes in ponds by no later than May 2002. This requirement ensures compliance with the RCRA land disposal restrictions ("LDRs"), which prohibit the placement of hazardous wastes on land unless the wastes comply with EPA-specified treatment levels. The Consent Decree specifically requires FMC to design and construct a waste treatment plant that will achieve LDR treatment standards applicable to the FMC Pocatello Plant wastes, to commence operation of the LDR treatment plant by May 2002, and thereafter to permanently cease placing wastes in ponds. (ER at 84-85.)

To protect human health and the environment during the time the ponds are in operation prior to May 2002, the Consent Decree requires FMC to comply with the EPA-approved Pond Management Plan and other requirements of the Consent Decree. (ER at 86.) The Tribes participated actively in formulating the Pond Management Plan requirements. The Pond Management Plan requires actions such as installation of monitoring equipment around the ponds and at the Facility fence line to measure and record emissions of toxic gases, contingency measures in the event that toxic gases exceed human health criteria, implementation of worker safety measures, implementation of operational changes that will reduce the potential for toxic gas emissions, installation of video cameras for continuous real-time surveillance of the ponds, expansion of existing fencing

around the ponds, and installation of nets or other devices to prevent migratory birds from landing on the ponds. (ER at 86.) EPA determined that compliance with the Pond Management Plan would be protective of human health and the environment. *See* SER at 10-14. Moreover, with knowledge of the Consent Decree requirements, the Tribes granted permits to FMC for its construction and continued use of ponds for waste storage. On April 13, 1998, FMC obtained a special use permit for the ponds from the Tribal Land Use Policy Commissioners, subject to payment of a $1 million startup fee and a $1.5 million annual permit fee payable to the Hazardous Waste Program of the Tribes Land Use Department. (CR 15 at 14-15.)

As part of the Consent Decree, FMC agreed to spend over $65 million on Supplement Environmental Projects ("SEPs") that will reduce particulate air emissions from the FMC Pocatello Plant by approximately 67%. SEPs are environmentally beneficial projects, *not* otherwise required by applicable federal, state or local laws or regulations, that FMC agreed to perform in exchange for partial reduction in the civil penalty amount assessed under the Consent Decree. At the outset of the Consent Decree negotiations, the Tribes and EPA told FMC they were interested primarily in SEPs that would reduce particulate air emissions from the Pocatello Plant significantly in advance of the effective date of the Federal Implementation Plan for the Pocatello region. (CR 15 at 15-17.) FMC responded by developing 13 air emission reduction projects to be incorporated in the Consent Decree as SEPs. The scope of each project was negotiated with and accepted by EPA Region 10 air officials, with input from the Tribes. Most of these SEPs have already been installed or otherwise carried out.

Finally, the Consent Decree requires FMC to spend $1.65 million to fund a joint study, managed by FMC and the Tribes, to assess the human health effects on residents of the Fort Hall Reservation from the FMC Pocatello Plant releases of hazardous substances. The study is included in the Decree as a SEP. (ER 32.)

REASONS FOR DENYING THE WRIT

I. The Tribes' Factual Assertions are Unsupported.

The Tribes' Petition for Writ of Certoriari alleges that FMC's Pocatello Plant mineral processing wastes are "ignitable" or "reactive" hazardous wastes subject to regulation under RCRA. Tribes' Petition at 3. This assertion is unproven. *Supra* at page 5, n.4. The Tribes also misperceive the scope of the Consent Decree as covering 50 years of FMC Pocatello Plant operations, including past and future air emissions, and historic releases of hazardous substances. Tribes' Petition at 3, 5. The Consent Decree is limited in scope to hazardous waste management and in time to FMC's waste management after RCRA requirements became applicable in September 1989. And the Tribes' Petition is based on the assumption that measures adequate to protect the general public's health and the environment will not be equally protective of Tribal health and the environment. There is no evidence in the record to support this assumption.

II. The Decision Below Does Not Conflict with Decisions by this Court.

The United States and FMC agreed to the Consent Decree, thereby avoiding litigation between the parties that could have resulted in fewer, less restrictive requirements

than those set forth in the Consent Decree. EPA agreed to the Consent Decree after diligent, good faith consultations with the Tribes, and after determining that the Consent Decree would be protective of human health and the environment. The Tribes were present and participated in negotiatons between the United States and FMC regarding the environmental requirements of the Consent Decree. Indeed, many Consent Decree requirements were included at the specific request of Tribal representatives. While the Tribes believe the Consent Decree is not perfect in every respect, they failed to offer the District Court evidence that the Consent Decree is not reasonable, and protective of Tribal human health and the environment. Moreover, the record in this case establishes that the United States fulfilled its fiduciary duties to the Tribes by consulting extensively with the Tribes regarding Consent Decree requirements, including the Tribes in negotiations with FMC, and including many requirements requested by the Tribes.

The District Court entered the Consent Decree having considered all relevant law and material facts, including all objections to the Consent Decree made by the Tribes. The District Court found no legal or factual basis to refuse to enter the settlement that the United States Environmental Protection Agency and the Department of Justice determined to be a reasonable and environmentally protective means to assure that the FMC Pocatello Plant operates in compliance with RCRA.

The Ninth Circuit reviewed the District Court's decision and determined that the United States had appropriately discharged its fiduciary duties to the Tribes. Contrary to the Tribes' assertion, the Ninth Circuit decision does not establish "an extraordinary exception to its [the United States]

established fiduciary duties to Indian tribes." Tribes' Petition for Certiorari at 6. Rather, the Ninth Circuit's decision is consistent with the decisions of other Courts of Appeal and this Court regarding the fiduciary duties of the United States to Indian tribes.

CONCLUSION

For the foregoing reasons FMC respectfully requests that this petition for certiorari be denied.

Respectfully submitted,

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